IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

ELLEN JOHNSTON **PLAINTIFF**

V. **CIV. ACTION NO.: 2:07CV42 WAP-EMB**

ONE AMERICA PRODUCTIONS, INC.,
EVERYMAN PICTURES, TWENTIETH
CENTURY-FOX FILM CORPORATION
and JOHN DOES 1 AND 2 **DEFENDANTS**

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT FOR FAILURE TO STATE A CLAIM

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INTRODUCTION AND SUMMARY OF ARGUMENT

Defendants One America Productions, Inc. and Twentieth Century Fox Film Corporation move to dismiss the Complaint in its entirety because it fails to state a claim upon which relief may be granted. Plaintiff's suit relates to her very brief appearance (less than three seconds) in the award-winning movie "BORAT", an expressive work entitled to the full protection of the First Amendment. *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 501-02 (1952). Johnston alleges that Defendants invaded her privacy by including her image in the film "with her arms raised above her head praising the Lord." Below is a still or freeze frame of Plaintiff from the film.[1]

[1] This still shot was provided to counsel for Defendants by counsel for Plaintiff.

As can be seen, Plaintiff is one of many worshipers captured in a crowd scene filmed at a church camp meeting.[2] She is not identified by name, does not speak on film, and is seen doing what several others in the same scene are doing. Plaintiff was aware the meeting was being filmed, and does not claim that her image, as it appears in the film, is altered in any way. She seeks compensatory damages of $100,000.00 and punitive damages of $500,000.00. Complaint 2 (March 19, 2007); Docket No. 1.

THE APPLICABLE STANDARD

Claims for defamation and invasion of privacy when based on a written publication or a video tape are subject to judicial scrutiny at the "early stages" of a legal action. *Mitchell v. Random House, Inc.*, 703 F. Supp. 1250, 1258 (S. D. Miss. 1988), *aff'd,* 865 F.2d 664 (5th Cir. 1989). A Rule 12(b)(6) motion tests whether relief could be granted under any set of facts that could be proven consistent with the allegations of the Complaint. However, the "famous observation" in *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957) - that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief" - has been retired by the United States Supreme Court. *See Bell Atlantic Corp. v. Twombly,* 127 S. Ct. 1955, 1968-69 (2007).

With its pronouncement, the Supreme Court clarified the pleading requirements necessary to show that a plaintiff may proceed with her lawsuit. "[F]ormulaic recitation of the elements of a cause of action will not do. . . . Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing … [the] 'grounds' on which the claim rests." *Twombly,* 127 S. Ct. at 1965. The pleading must show "plausible liability"; a "mere possibility" that plaintiff is entitled to relief is not enough. And the factual allegations must be "enough to raise a right to relief above the speculative level." *Twombly, supra* (some internal quotation marks omitted).

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[2] The movie is a series of vignettes connected only by the title character Borat's travel across the United States. The camp meeting is depicted at Scene 20. See DVD of film "BORAT"; Exhibit 2 to Defendant's instant Motion to Dismiss. A copy of Exhibit 2 has been served and filed with the Clerk of the District Court by Notice of Conventional Filing (June 20, 2007).

Even before *Twombly,* Rule 12(b)(6) jurisprudence held that the well-pleaded facts of the Complaint control, not the plaintiff's legal conclusions or conjectures. Unwarranted assertions are not taken as true when contradicted by facts contained in a document or other publication referenced in the pleading. *Associated Builders, Inc. v. Alabama Power Co.,* 505 F.2d 97, 101 (5th Cir. 1974). If a document or other publication is referenced in a complaint for defamation or invasion of privacy and the publication is central to the dispute and no party questions its authenticity, it may be considered by the court on a motion to dismiss. *E.g., Berry v. Safer,* 293 F. Supp. 2d 694 (S.D. Miss. 2004) (district court reviewed videotape and transcript of CBS "60 Minutes" segment entitled "Jackpot Justice" in defamation action). The Court may also consider facts that are properly the subject of judicial notice or matters of common knowledge. *E.g., Lovelace v. Software Spectrum,* 78 F.3d 1015, 1017-18 (5th Cir. 1996) (SEC filings); *Mitchell v. Random House, Inc.,* 703 F. Supp. 1250, 1253 n. 4 (S.D. Miss. 1988) ("The court notes that it is common knowledge that the late Elvis Presley, the person about whom the Book was written, was born in Mississippi.").

STATEMENT OF FACTS

Viewing the Complaint as Rule 12(b)(6) and its accompanying jurisprudence requires, the facts as alleged are as follows: Plaintiff was filmed by the makers of the movie "Borat" while she was participating in an indoor church camp meeting, attended by hundreds of others, including her fellow believers and certain federal and state elected officials. Complaint

(Exhibit 1 to Defendants' Motion To Dismiss); Scene 20 of DVD of "BORAT" (Exhibit 2 to Defendants' Motion). Like others in the crowd of worshipers, Plaintiff appears in the film "with her arms raised above her head praising the Lord" after the title character Borat addresses the entire gathering and pretends to speak in tongues. The viewer understands the religion portrayed is the Pentecostal faith, a fundamental charismatic Christian denomination.[3] Plaintiff was aware that a camera crew was filming what took place, but believed they were filming a "religious documentary." Complaint ¶ 6. Defendants did not obtain a written release from Plaintiff. *Id.* Plaintiff alleges that the film invaded her privacy, placed her in a false light, mocked her religion, and violated her expectation of privacy; and that the gross negligence of Defendants constituted a willful, wanton, and reckless disregard for Johnston's right to privacy for Defendants' own monetary profit. Id. ¶ 7.

LEGAL ARGUMENT

A. Choice of Law

Defendants assume solely for the purposes of this Motion that the laws of Mississippi apply since the Complaint alleges that Johnston is domiciled in Mississippi and the movie about which she complains was shown here. Complaint ¶¶ 1-2; *See Klaxon Co. v. Stentor Electric Mfg. Co.,* 313 U.S. 487 (1941) (in diversity action federal court applies substantive law of forum state, including its choice-of-law rules); *Davis v. National Gypsum Co.,* 743 F.2d 1132 (5th Cir. 1984) (in tort actions Mississippi applies the law of the state where the injury occurred, unless another state has a more substantial relationship to the action); Restatement (Second) of Conflicts of Laws § 153 (1971) (in an alleged invasion of privacy action based on a motion

[3] Near the beginning of the scene, an elected public official addressing the gathering identifies it as a "Pentecostal camp meeting." Scene 20 of DVD of "BORAT"; Exhibit "2" to Defendants' Motion.

picture film, the law of the state of the plaintiff's domicile will ordinarily apply if the matter complained of was published there).

B. The Privacy Claims Alleged In The Complaint

The Supreme Court of Mississippi has noted the academic separation of the common law privacy tort into four subclasses: (a) false light; (b) disclosure of private facts; (c) intrusion upon seclusion; and (d) appropriation of one's name or image for commercial purposes. *See, e.g., Deaton v. Delta Democrat Publishing Co.,* 326 So. 2d 471, 473 (Miss. 1976). Privacy claims are subject to the same legal principles and same defenses as the common law claim of defamation. *E.g., Prescott v. Bay St. Louis Newspapers, Inc.,* 497 So. 2d 77, 80-81 (Miss. 1986) (false light); *Young v. Jackson,* 572 So. 2d 378, 381-82 (Miss. 1990) (disclosure of private facts). While it is not clear what precise privacy claim (or claims) that Johnston alleges, her Complaint fails to include the essential averments that would entitle Johnston to proceed under any of these four privacy torts.

C. The Film Does Not Portray Johnston In A False Light

In any false light privacy action based on a mass media publication such as this one, the plaintiff must satisfy certain well-established essential elements of any Mississippi common law defamation claim. This includes the manner in which the court reviews that text or images of the publication when considering the allegations of the claim, whether it be for defamation or one of the privacy torts. To this end, our State Supreme Court has explained that the

> words used must have been clearly directed at the plaintiff (and) the [false light] must be clear and unmistakable from the words themselves and not the product of innuendo, speculation or conjecture.

Prescott, 497 So. 2d at 81 (alterations in the original and citations omitted). These requirements "are stringently applied" by the Fifth Circuit and the Mississippi appeal courts. *Gales v. CBS Broadcasting, Inc.,* 269 F. Supp. 2d 772, 778 (S.D. Miss. 2003), *quoting Mize v. Harvey Shapiro Enterprises, Inc.,* 714 F. Supp. 220, 224 (N.D. Miss. 1989).

A claim for false light must also identify "particular statements or passages [about the plaintiff] that are false and invade her privacy." *Mize v. Harvey Shapiro Enterprises, Inc.,* 714 F. Supp. 220, 225 (N.D. Miss. 1989) (dismissing false light claims based on review of text and photographs in advertisement of "swinger meeting guide" magazine). Not every misstatement of fact is actionable; substantial truth is a defense to false light just as it is a defense to a defamation claim. *Prescott,* 497 So. 2d at 80; *accord, Blake v. Gannett Co.,* 529 So. 2d 595, 606 (Miss. 1988). "The trial court's function is to determine whether the statements bear the meaning ascribed to them by the plaintiff and whether that meaning is [actionable]." *Mitchell v. Random House, Inc.,* 865 F.2d 664, 669 (5th Cir. 1989).

In addition to these "stringent[ ]" requirements, the publication is actionable only if

> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
>
> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Prescott, 497 So. 2d at 79, *quoting* Restatement (Second) of Torts § 652E (1977). As shown below, the Complaint fails to satisfy several of these essential elements.

1. The Complaint Fails to Identify Any Statements That Are "Clearly Directed" At Plaintiff.

The Complaint does not allege that any person or character in the film makes *any* statement -- false, offensive, or otherwise -- that is "clearly directed" at Johnston. A review of the church camp scene and a transcript of the scene confirms that the film makes no statements about Johnston. The Pentecostal preacher makes certain statements about Borat, and Borat makes certain statements about several fictional characters and one non-fictional person, none of whom is Johnston. None of these statements can be reasonably interpreted as being "clearly directed" to Johnston. *See Mize,* 714 F. Supp. at 224 (dismissing false light claim as a matter of law based on review of text and photographs in advertisement of "swinger" magazine).

The Complaint alleges that Borat "mocks Plaintiff's religion by addressing the entire group of people on camera and pretending to speak in tongues." Complaint ¶ 5. Nowhere, however, does Johnston allege that Borat mocks *her*. To the extent Johnston's allegation[4] might be interpreted as an attempt by Plaintiff to recover for a statement made against the Pentecostal church, her claim also fails.

Under Mississippi law, an individual plaintiff may not proceed with a claim for defamation or false light privacy based upon "'[v]ague, general references to a comparatively large group . . . .'" *Gales v. CBS Broadcasting, Inc.,* 269 F. Supp. 2d 772, 782 (S.D. Miss. 2003), *quoting Annot., Defamation of Class or Group as Actionable by Individual Member,* 52 A.L.R.4th 618, § 23 (1987). In *Gales* members of a jury that had returned a multi-million dollar verdict against a pharmaceutical company in Jefferson County Circuit Court brought a suit for defamation and false light against the producers, reporters, and interviewees who had appeared on a CBS "60 Minutes" news segment about runaway jury verdicts in Mississippi. The District Court noted that while the interviewees' statements "refer to 'the jurors' and 'the jury' respectively, they never refer to any particular jury. The statements therefore were not ‘clearly

[4] For purposes of this discussion, Defendants treat this allegation as an assertion that Borat "mocks" the Pentecostal Church, since a “religion” is not a group of people and “mocking” a religion is not actionable.

directed toward' nor 'of and concerning' the [plaintiff] jurors in the 1999 Fen Phen case. At best they were of and concerning jurors in Jefferson County." 269 F. Supp. 2d at 782.

The District Court concluded that "[a]s a matter of law, an alleged defamation against all jurors in Jefferson County can have no personal application to any individual juror. The only way a Jefferson County juror can maintain suit is if 'the circumstances of publication reasonably give rise to the conclusion that there is a particular reference to' that juror." 269 F. Supp. 2d at 782, *quoting* Restatement (Second) of Torts § 564A; *accord, Edmonds v. Delta Democrat Publishing Co.,* 93 So. 2d 171, 174 (Miss. 1957) (executive director of the United Dry Association, a pro-prohibition group, may not pursue defamation claim based on newspaper editorial about the "Drys", which referred "to no particular person, but to . . . those who advocated no change in the prohibition laws, which included a majority of the qualified voters participating in the liquor referendum"). Plaintiff therefore may not proceed with a privacy claim based upon alleged statements made about her church.

2. The Complaint Fails To Identify Any False Statements About Or False Image Of Plaintiff.

"Truth is a defense to false light. [I]f the statement is not false, little else matters." *Prescott,* 497 So. 2d at 80. The Complaint alleges that "Defendants portrayed Plaintiff in a false light in that the movie *Borat* shows the Plaintiff with her arms raised above her head praising the Lord as Sacha Baron Cohen's character, Borat, mocks Plaintiff's religion by addressing the entire group on camera and pretending to speak in tongues." Complaint ¶ 5.

Although the Complaint does not identify Plaintiff's religion, the viewers of the film know that this is an indoor Pentecostal camp meeting. See Exhibits 2 & 3 to Defendants' Motion. The allegation that a person's religion has been "mocked" or for that matter is the subject of "contempt, mockery, scorn and ridicule" is not actionable under the First Amendment. *See Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 505 (1952). "[F]rom the standpoint of freedom of speech and the press, . . . the state has no legitimate interest in protecting any or all religions from views distasteful to them . . . . It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures." *Id.*, *quoted in part and followed in, Smith v. State,* 242 So. 2d 692, 697 (Miss. 1970) (anti-evolution statute declared unconstitutional under First Amendment).

Notably, the Complaint does not allege that Plaintiff's image in the film has been altered or is falsely depicted. Similarly, the Complaint does not allege that for Plaintiff to be seen with her hands raised above her head at a worship service is contrary to the basic tenets or practices of her charismatic Christian faith. Nor could she. It is common knowledge that members of the Pentecostal Church engage in this as well as other practices shown in the film, including spontaneous outbursts of praise and speaking in tongues. Images and descriptions of members of the Pentecostal religion worshiping and praying with their hands in the air may be found in standard scholarly works. See Collective Exhibit 4 to Defendants' Motion.[5] In this context, the film does not depict Plaintiff falsely, and thus it does not portray her in a false light. Plaintiff is seen for three seconds doing exactly what other members of her faith do. Plaintiff's false light claim therefore fails because the church camp scene contains no false statements that are clearly directed at her.

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[5]To this end, the District Court may take judicial notice of these religious practices of the Pentecostal Church. *See Werner v. McCotter,* 49 F.3d 1476, 1480 (10th Cir. 1995) (judicial notice of the central and fundamental role played by the Sacred Sweat Lodge in many Native American religions); *Northern Trust Co. v. Commissioner of Internal Revenue,* 116 F.2d 96, 98 (7th Cir. 1940) (judicial notice of general teachings of the Christian Science religion). The District Court may also take judicial notice of standard library references that explain or show images of this practice of the Pentecostal religion. *See Werk v. Parker*, 249 U.S. 130, 132-33 (1919) ("[W]e deem it clear, beyond question - that the court was justified in taking judicial notice of facts that appeared so abundantly from standard works accessible in every considerable library").

The Complaint alleges that Plaintiff "was led to believe that Mr. Cohen's camera crew was filming a 'religious documentary'." Complaint ¶ 5. Thus, the Complaint expressly acknowledges that Plaintiff knew that she and her fellow worshipers were being filmed as they worshiped. Her real objection then is not that she was filmed but rather to the content of the film. The Complaint does not allege how the filming of her with her fellow believers while worshiping would be any different for a religious documentary than filming for any other commercial film. Presumably, Plaintiff would have worshipped in the same way in either setting.

Even if Plaintiff alleged (which she does not) that the content of the film somehow "tainted" her, that claim would fail. A false light plaintiff made a similar argument in *Mitchell v. Random House, Inc.,* 703 F. Supp. 1250 (S.D. Miss. 1988). There the plaintiff alleged that the depiction in a book of the plaintiff as a witness to an 11-year-old girl's wedding cast the plaintiff in a false light even though the statement was true. As the District Court explained, what the plaintiff "complains of, as noted previously, is that the statements contained in the book leave a false impression that she participated in the marriage of an unwilling eleven year old to her brother." 703 F. Supp. at 1259. After reviewing what the text actually said about the Plaintiff, the court concluded that the plaintiff "does not contest the truthfulness of the statements themselves and the statements used cannot reasonably be said to create the impression which plaintiff urges," and plaintiff 'can only rely on innuendo, speculation or conjecture to make out [her] case and this is not enough.'" 703 F. Supp. at 1259-60, *quoting Prescott,* 497 So. 2d at 81.

On appeal the Fifth Circuit affirmed the District Court's Rule 12(b)(6) dismissal of the plaintiff's claims of defamation and false light. *Mitchell v. Random House, Inc.*, 865 F.2d 664 (5th Cir. 1989). In doing so, the Fifth Circuit rejected Mitchell's argument that the account of the wedding was clearly directed at her. The Fifth Circuit explained:

> This "crime," like the "coercive" elements of de Barbin's wedding, is not directed at Mitchell. Mitchell is a minor character without whom the story of coercion would still be complete. The words that are of and concerning Mitchell do not clearly and unmistakably defame her. It is only through innuendo, speculation, and conjecture that the reader might find Mitchell aware of and agreeable to the abuses of de Barbin's grandmother and Ware, or aware of de Barbin's age.

865 F.2d at 671. The Fifth Circuit reasoned that the Mississippi Supreme Court's rejection of defamation by implication or innuendo made it "doubtful" that Mississippi would "significantly undercut" the protections afforded against defamation claims by failing to enforce the same strict requirements upon false light claims. 865 F.2d at 672.

The Complaint does not allege that Johnston or the Pentecostal Church had been granted any type of control over the content of the film. Thus, she can not reasonably suggest that she expected the content of the final version of the film - regardless of whether it was for a religious documentary or some other type of film - would necessarily comport with her own subjective opinions or sensibilities. No reasonable viewer would believe that, because her image briefly appears in a crowd scene in the movie, Plaintiff approved the content of the film, explicitly or implicitly. Including in a commercial film - whether it is a religious documentary or something else - an accurate image of Plaintiff, who does not rise to the status of a "minor character" in the film, does not create a false impression about Plaintiff or place her in a false light. *Compare*, *Schifano v. Green County Greyhound Park, Inc.*, 624 So. 2d 178, 180-81 (Ala. 1993) (photograph of plaintiff "simply depicts a scene of normal activity at the [racing] Park") *with*

Rapp v. Jews for Jesus, Inc., 944 So. 2d 460 (Fla. App. 4th Dist. 2007) (false statements in religious organization's newsletter and web site that plaintiff had forsaken her religious beliefs and accepted tenants of Christianity portrayed the plaintiff in a false light). Thus, Johnston has also failed to allege facts sufficient to satisfy this essential element of her claim.

3. The Complaint Fails To Identify Any Statement About Or Image Of Plaintiff That Is Highly Offensive To A Reasonable Person.

As the preceding section shows, the Complaint does not allege that the film contains false facts about Plaintiff or depicts Plaintiff falsely or in a misleading manner. Plaintiff is simply depicted in a mode of worship characteristic of her Pentecostal religion. Raising one's hands in the air in praise or prayer is recorded in the Bible,[6] and it is described or can be seen depicted in standard references about the Pentecostal faith. See Collective Exhibit 4 to Defendants' Motion (examples of standard library references showing photo of Pentecostals with hands raised or noting that "hands are often raised during times of praise"; "worshipers may express themselves with raised hands, applause, laughter, cheering, open displays of emotion . . . ."). The Complaint expressly acknowledges that Plaintiff knew that she and her fellow worshipers were being filmed as they worshiped. See Complaint ¶ 5. In this context, including Plaintiff's image in a crowd scene as she publicly worshipped can not reasonably be deemed to be "highly offensive to a reasonable person." *Prescott,* 497 So. 2d at 79; *see Cook v. Mardi Gras Casino Corp.,* 697 So. 2d 378, 382-83 (Miss. 1997); *Schifano v. Green County Greyhound Park, Inc.*, 624 So. 2d 178, 180 (Ala. 1993) ("the photograph of the plaintiffs in the public seating they chose to occupy can not be interpreted as being 'highly offensive' to a reasonable person").

The Complaint's allegation that the film "mocks Plaintiff's religion" does not satisfy this essential element. As already explained, any such claim is not actionable under the First

[6] See I *Kings* 8:22; *Psalms* 28:2; I *Timothy* 2:8.

Amendment. *Joseph Burstyn, Inc.,* 343 U.S. at 505. Further, the District Court is entitled to review the church camp scene in its entirety to determine if as a matter of law the film's depiction of Johnston and her fellow worshipers is highly offensive to a reasonable person. Rather than mocking Plaintiff and her fellow worshipers, the depiction of the members of Plaintiff's faith is in fact affirming and quite positive. The participants in the church camp episode are shown as being open to foreigners, warm, friendly, compassionate, enthusiastic, sincere in their beliefs, and as having a sense of humor. There is nothing uncomplimentary - much less highly offensive - in the film's depiction of Plaintiff (however briefly she may appear) and her fellow Pentecostal worshipers.

In sum, the church camp episode can not be reasonably interpreted as placing Plaintiff in a light that is highly offensive to a reasonable person.

D. The Film Does Not Reveal Any Private Fact About Johnston

The factual allegations of the Complaint show that Johnston cannot prevail upon a claim for public disclosure of a private fact. In order to state such a claim, Johnston would have to allege, among other elements, that Defendants (a) revealed a private fact about her (b) the publication of which would be "highly offensive" to a reasonable person. See *Young v. Jackson*, 572 So. 2d 378, 382 (Miss. 1990). "BORAT" is not about Johnston. So what facts - private or otherwise - does the movie reveal *about her*? Only two: She attended a Pentecostal church camp meeting along with numerous other fellow believers. While there, she gave praise to Jesus Christ by raising her hands in the air, just as many of her fellow believers did. The Complaint contains no factual allegations that would allow a reasonable person to conclude that these are private facts about her, the publication of which is embarrassing or humiliating to Johnston.

These certainly are not the type of facts the courts have found to be private. *See, e.g., Young v. Jackson*, 572 So. 2d 378 (Miss 1990) (fact of hysterectomy is one a woman might understandably wish to keep private, although disclosure of that fact under circumstances was privileged); *Deaton v. Delta Democrat Publishing Co.*, 326 So. 2d 471, 474 (Miss. 1976) (fact that child has "limited mental capabilities or is in any sense mentally retarded" is of private concern). The fact that she and her fellow believers knew they were being filmed for a documentary negates any suggestions that what we see on the film is "private." *See Schifano v. Green County Greyhound Park, Inc.*, 624 So. 2d 178, 180-81 (Ala. 1993); *Cox v. Hatch,* 761 P.2d 556, 564 (Utah 1988) ("[T]he photograph here was taken in an open place and in a common workplace where there were a number of other people . . . . [Plaintiffs] also were in a place where they had no reasonable expectation of privacy, at least to the fact of their being there in the company of others.").

Nor would the disclosure of these alleged facts be "highly offensive" to a reasonable person. Nothing in the Complaint suggests that Plaintiff's involvement in the Pentecostal faith, or her attendance at the camp meeting, was a secret, the disclosure of which is embarrassing or harmed her in any way in the eyes of a reasonable person. The manner in which Plaintiff is worshipping is entirely consistent with the recognized practices of her faith. Further, it is undisputed that the Pentecostal religion is one of the most popular, rapidly growing Christian denominations in the United States. The truthful revelation that Plaintiff is a member of that faith, or that she worships in the same manner as other members of her denomination, could not be "highly offensive" to a reasonable person.

E. The Filmmakers Did Not Intrude Upon Johnston's Seclusion

Nothing in Plaintiff's Complaint supports a claim for intrusion. A party claiming invasion of privacy by intrusion upon seclusion must be able to show that the "interference with the plaintiff's seclusion is a substantial one, of a kind that would be highly offensive to the ordinary reasonable man, as the result of conduct to which a reasonable man would strongly object." *Monsanto Co. v. Scruggs*, 342 F. Supp. 2d 602, 606 (N.D. Miss. 2004), *quoting Candebat v. Flanagan,* 487 So. 2d 207, 209 (Miss. 1986) (noting that intrusion claim commits the plaintiff to "much heavier burden" of proof). In *Scruggs, supra,* the plaintiffs complained that Monsanto (in the process of investigating suspected patent infringement by the plaintiffs) videotaped activities at the Scruggs' family business from a trailer set up across the street; observed activities at the business through binoculars; followed family members and employees on errands; and approached customers asking permission to look at the contents of trucks leaving the business. This Court found that the activities were "simply not egregious enough" to constitute intrusion upon their seclusion. *Monsanto,* 342 F. Supp. 2d at 606; *see also Schifano v. Green County Greyhound Park, Inc*., 624 So. 2d 178, 180-81 (Ala. 1993) ; *Cox v. Hatch,* 761 P.2d 556, 564 (Utah 1988); c*ompare American Guarantee & Liability Ins. Co. v. The 1906 Co.*, 273 F.3d 605 (5th Cir. 2001) (finding photographer's surreptitious videotaping of models in dressing room would constitute invasion of privacy under Mississippi law).

Johnston does not allege that she was at a private worship service, but only that she was filmed "in an interior setting." The film shows that the camp meeting took place inside a large auditorium and was attended by a large number of people. Thus Johnston's surroundings certainly were not such that she might reasonably believe her actions could not be readily and easily observed by everyone around her. Nor does Plaintiff allege that entry to the facility and/or the camp meeting was limited in any way that led her to believe only a small, select group of individuals could see her or what she was doing. In any event, what the film shows for the three seconds that her image is on the screen is nothing more than what her fellow believers saw as they publicly worshipped together.

The death knell for any intrusion claim is Johnston's admission that she knew she was being filmed as she worshipped. Johnston was aware a camera crew was recording what took place at the meeting, and yet she voluntarily remained while the filming occurred. By her conduct, she consented to the filming, and she cannot now complain of an intrusion upon her privacy. *See Andrews v. GAB Bus. Servs., Inc.*, 443 F. Supp. 510, 513 (N.D. Miss. 1977), *citing* W. Prosser, The Law of Torts § 117, at p. 817 (4th ed. 1971) (plaintiff's consent to invasion bars recovery; consent may be given expressly or by conduct). By remaining in the facility after she became aware that the camera crew was filming, Johnston consented to that filming and cannot recover on any claim for intrusion.

The Complaint alleges that Johnston believed the filming was for a "religious documentary," thus implying that this characterization of the expected film influenced her participation and consent. Although she alleges that her understanding of why the film crew was taping is different from the actual end product, this does not negate her consent. In *Andrews*, the plaintiffs claimed that an insurance adjuster misrepresented his intentions in order to gain access to them at the hospital where their child was dying and to get their authorization for the release of the child's medical records. This Court held that the parents voluntarily spoke with the adjuster, and their contention that the adjuster used deceit did not "impair the validity of the consent." *Andrews*, 443 F. Supp. at 513. By remaining in the facility after she knew the camera crew was filming, Johnston consented to that filming and cannot recover on any claim for intrusion.

F. *The Filmmakers' Use of Johnston's Image In The Film Is Protected By The First Amendment And, In Any Event, Is Not A Commercial Appropriation of Her Image.*

Arguably the Complaint attempts to allege a claim for invasion of privacy based on the commercial appropriation of Plaintiff's name or image. Complaint ¶ 6. If so, this claim also fails because the use of Plaintiff's image in an expressive work is non-actionable and fully protected under the First Amendment. But the Court need not reach the constitutional defense. The use of Johnston's image in an expressive work is similarly not actionable at common law, and in any event, the use of her image is so incidental that no reasonable person could conclude that there has been a commercial appropriation of her image or likeness.

When first establishing the contours of the commercial appropriation tort, the Mississippi Supreme Court expressly recognized and adopted the rationale for this tort as set forth in the Restatement (Second) of Torts (1977). *See Candebat v. Flanagan,* 487 So. 2d 207, 212 (Miss. 1986).

As explained in the Restatement (Second) of Torts,

> the "common form of invasion of privacy" under the rule here stated "is the appropriation and use of the plaintiff's name or likeness to advertise the defendant's business or product, or for some similar commercial purpose."

Id. § 652C, comment *b* (1977). The Mississippi courts have permitted an appropriation claim to proceed only where the image or likeness of the plaintiff is used in connection with a commercial advertisement. *See Candebat v. Flanagan,* 487 So. 2d 207, 209 (Miss. 1986) (use of plaintiffs' names without permission in defendant's sales kit for accident coverage benefits program); *Harbin v. Jennings,* 734 So. 2d 269, 272 (Miss. Ct. App. 1999) (use of plaintiff's photograph in thousands of picture frames widely distributed and displayed in numerous retail sales establishments). "Courts long ago recognized that a celebrity's right of publicity does not preclude others from incorporating a person's name, features or biography in a literary work, motion picture, news or entertainment story. Only the use of an individual's identity in advertising infringes on the persona." *Matthews v. Wozencraft,* 15 F.2d 432, 439 (5th Cir. 1994), *quoting* Armstrong, *The Reification of Celebrity: Persona as Property*, 51 La. L. Rev. 443, 467 (1991). Thus, the use of Johnston's image in the film is not actionable as commercial appropriation.

In any event, not every use of a person's name or image is prohibited. The "incidental use" of a person's name or likeness, whether in a mass media publication or a commercial setting, is similarly not actionable:

> *d. Incidental use of name or likeness.* . . . **No one has the right to object merely because his name or his appearance is brought before the public, since neither is in any way a private matter and both are open to public observation. It is only when the publicity is given for the purpose of appropriating to the defendant's benefit the commercial or other values associated with the name or the likeness that the right of privacy is invaded. The fact that the defendant is engaged in the business of publication, for example of a newspaper, out of which he makes or seeks to make a profit, is not enough to make the incidental publication a commercial use of the name or likeness.** Thus a newspaper, although it is not a philanthropic institution, does not become liable under the rule stated in this Section to every person whose name or likeness it publishes.

(Emphasis added.) Restatement (Second) of Torts § 652C, comment *d* (1977).

Defendants have not been able to locate any published decision by a federal or state court applying Mississippi law that addresses the incidental use principle. As a federal court has noted when reviewing a commercial appropriation claim brought under New York's appropriation statute, the "incidental use exemption protects the writers and publishers of books and other materials from liability for “isolated,” “fleeting,” or “de minimis” uses of a person's name or image." *Netzer v. Continuity Graphic Associates, Inc.,* 963 F. Supp. 1308, 1326 (S.D.N.Y. 1997) (collecting cases). Numerous jurisdictions have adopted and followed this principle. *E.g., Schifano v. Green County Greyhound Park, Inc*., 624 So. 2d 178, 181 (Ala. 1993) (plaintiffs could not recover for commercial appropriation based on racing park’s use of group photograph in advertising brochure where there was no unique quality or value to plaintiffs’ likeness); *Aligo v. Time-Life Books, Inc*., 1994 WL 715605 (N.D. Cal. 1994) (use of the plaintiff's picture from cover of prior magazine once along with dozens of other covers of prior magazines in 29-minute infomercial promoting a rock music anthology is an incidental use of the plaintiff's image and is insignificant to selling the anthology); *Preston v. Martin Bregman Productions, Inc*., 765 F. Supp. 116, 118-19 (S.D.N.Y. 1991) (use of the plaintiff's image in motion picture film for approximately nine seconds where face of the woman is visible for about 4 ½ seconds in the opening credits is incidental use and not actionable under New York appropriation statute); *Vinci v. American Can Co*., 591 N.E.2d 793 (Ohio Ct. App. 1990) (use of plaintiff’s name on drinking cup within the context of providing accurate historical information was incidental to sales of promotional disposal drinking cups; and did not reasonably imply that the plaintiff used, supported, or promoted the product); *Cox v. Hatch,* 761 P.2d 556, 564-65 (Utah 1988) (use of the plaintiffs' image in photograph for an eight-page political flier for U.S. Senator Orrin Hatch campaign where the plaintiffs are unidentified by name is not actionable).

Freedom of expression under the First Amendment of the United States Constitution and Section 13 of the 1890 Mississippi Constitution would otherwise become unreasonably chilled by the assertion of such claims in this context. *See Matthews v. Wozencraft,* 15 F.2d 432, 437-38

(5th Cir. 1994); *Time, Inc. v. Hill,* 385 U.S. 374, 388 (1967). Since the use of Plaintiff's image as part of a crowd scene in the film is not actionable as a matter of law, and the use of her image is incidental in the film and can not be reasonably suggested as being used for the purpose of commercially trading on her image or likeness, any alleged commercial appropriation claim must be dismissed as a matter of law.

CONCLUSION

For the reasons explained above, Defendants respectfully request that their Motion to Dismiss the Complaint be granted and that the Complaint be dismissed with prejudice with costs assessed to Plaintiff.

THIS, the 20th day of June, 2007.

ONE AMERICA PRODUCTIONS, INC.
AND TWENTIETH CENTURY FOX
FILM CORPORATION

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CERTIFICATE OF SERVICE

I, John C. Henegan, one of the attorneys for Defendants, do hereby certify that I have this day filed the above and foregoing MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT FOR FAILURE TO STATE A CLAIM with the Clerk of the Court via the Court's ECF System which served a true copy upon the following via the Court's ECF system:

William O. Luckett, Jr.
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ATTORNEY FOR PLAINTIFF

SO CERTIFIED, this the 20th day of June, 2007.

s/ John C. Henegan
JOHN C. HENEGAN

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